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# The Building and Maintenance of “Ethics Walls” in Administrative Adjudicatory Proceedings<sup>1</sup>

By Jeff Bush<sup>2</sup> and Kristal Wiitala Knutson<sup>3</sup>

Before I built a wall I'd ask to know  
What I was walling in or walling out,  
And to whom I was like to give offence.  
Something there is that doesn't love a wall,  
That wants it down.<sup>4</sup>

Robert Frost

Nearly all states use “in-house” hearing officials at some level in adjudicatory proceedings or hearings. Even a central panel may encounter issues that require the insulation of adjudicators from internal influences. This article addresses the need for “ethics walls”<sup>5</sup> within administrative agencies and discusses an approach to

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1. This article is the product of a workshop session, developed by the authors for the 2002 National Training and Continuing Education Conference of the National Association of Hearing Officials in Anchorage, Alaska. The workshop primarily addressed the realities of organizational and communication issues when administrative adjudicators are employed by the same government agency appearing before them. This article is based on the authors' views and experiences; it is not a comprehensive review of the subject. Deep thanks to Judge Laurence H. Geller, formerly (now retired) Presiding Administrative Law Judge, California Department of Social Services, for his time and suggestions in the editing of this article.

2. Deputy Director, Alaska Public Entity Insurance, formerly Deputy Commissioner, Alaska Department of Community and Economic Development.

3. Public Disclosure Manager, formerly Review Judge, Washington State Department of Social and Health Services.

4. Robert Frost, *Mending Wall*, in THE POETRY OF ROBERT FROST 32-36 (Edward Connery Lathem ed., Holt 1979).

5. Commonly referred to as a “Chinese wall,” the term connotes a screening device that prohibits the exchange of confidential information between different departments of an organization with potential conflicts of interest. The authors elect to use the term “ethics wall,” recognizing “[t]he term [Chinese wall] has an ethnic

building and maintaining organizational safeguards to protect administrative judges and hearing officers. Even where an adjudicatory function is not structurally “independent” of the agency, this article describes what the adjudicator may do to maintain his or her integrity and impartiality in the administrative hearing.

## I. THE TENSION BETWEEN AGENCIES AND HEARING OFFICIALS

Due process, which ensures “a fair trial in a fair tribunal,”<sup>6</sup> is the fundamental requirement in administrative adjudication and its essential purpose.<sup>7</sup> “Not only is a biased decision maker constitutionally unacceptable, but ‘our system of law has always endeavored to prevent even the probability of unfairness.’”<sup>8</sup>

If an administrative adjudicator works within the agency that makes an initial administrative determination or takes adverse action against a citizen or business, tension arises when the correctness of the decision is reviewed within the same agency. It is natural for differences of opinion to exist. An agency or commission performs on many levels affecting the subjects of its regulations: it may adopt rules, license facilities or professionals, and grant benefits or services; it then may investigate whether a facility or person complies with its standards and decide whether to take adverse action; and next it notifies the affected party of its decision or enforcement action. If the notified facility or recipient disagrees with the action, the agency may appear through a staff representative at the hearing to support its position. When the agency designates another agency employee as the hearing official to decide whether the agency acted correctly, the situation arises that is the primary organizational tension addressed in this article. After the hearing official renders a decision, the agency will be required to implement that result, but may be reluctant to do so if the decision contradicts the original agency action taken.

While involvement of the administrative agency at so many levels may raise the hackles of some, courts generally hold that this

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focus which many would consider a subtle form of linguistic discrimination.” *Peat, Marwick, Mitchell & Co. v. Superior Court*, 200 Cal. App. 3d 272, 293 (1988). In today’s computer parlance, the concept could also be called a “firewall.”

6. *In re Murchison*, 349 U.S. 133, 136 (1955).

7. *Withrow v. Larkin*, 421 U.S. 35, 46-57 (1975).

8. *State v. Lundgren Pac. Constr. Co.*, 603 P.2d 889, 896 (Alaska 1979) (quoting *In re Murchison*, 349 U.S. at 136).

combination of adjudicative, investigative, and prosecutorial functions in an agency is not a violation of due process.<sup>9</sup> Bias must be demonstrated before a court will find a violation.<sup>10</sup> As the Washington State Supreme Court stated, "[T]he mere combination of adjudicative and investigative powers in one agency, without more, would not be viewed by a reasonably prudent and disinterested observer as denying any party a fair, impartial, and neutral hearing."<sup>11</sup>

The difficulty in an agency adjudicator's review of the employing agency's action is the natural human aversion to having someone else evaluate whether one is right or wrong. The adjudicator typically does not supervise the investigator, hearing representative, or other agency employee who implements the decision. The adjudicator attempts to direct agency actions through the decision, not the usual organizational hierarchy.<sup>12</sup> To protect decisional independence, the hearing official also must take the position that the agency cannot inform the adjudicator how to decide a specific case.<sup>13</sup> Agency

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9. *Withrow*, 421 U.S. at 47.

10. *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991); *see also* *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 99 Cal. App. 4th 880, 885-87 (2002) (finding that paid employment of the ALJ by the state agency party does not violate due process, because this financial interest is too remote to require disqualification without a showing of actual bias); *but see* *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 1032-34 (2002) (observing that an ALJ can be disqualified without a showing of actual bias, if he or she has a strong direct financial interest in the resolution of the case).

11. *Washington State Med. Disciplinary Bd. v. Johnston*, 663 P.2d 457, 465 (Wash. 1983); *see also* Christopher B. McNeil, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 32-33 (1998) ("It should come as no surprise that the agency adjudicative forum does not require a wholly independent adjudicator. Absent any state statutory or constitutional provision giving greater protection than the federal constitution, the independence required of agency adjudicators under the federal constitution flows first and foremost from the due process clause ... [which] requires only that there be a balancing of the individual's interest in fair and accurate results against the governmental interest in efficient and expedient decision making[.]").

12. *See* Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present and Future*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 101 (1999).

13. *See* *Nash v. Califano*, 613 F.2d 10, 16 (2d Cir. 1980) ("[T]he APA creates a comprehensive bulwark to protect ALJs from agency interference. The

management wonders, accordingly, why it should pay for hearing officials who will not necessarily decide cases supporting what it views as the agency mission and goals. As a consequence, these hearing officials not following the party line may be penalized in many direct or indirect ways, including being unable to keep salary parity or obtain adequate equipment, facilities, staff, and training.

A central panel system, however, is equally abhorrent to most agency managers. With this system, the agency fears that the central panel will lack expertise, take an anti-agency stance, and bill excessive costs.<sup>14</sup> The agency often decides to keep in-house adjudicators as “the devil they know,” maintaining at least direct fiscal control over hearing operations. With consolidation in government becoming the norm for cash-strapped states and legislatures reluctant to make potentially uncontrollable fiscal commitments, the move toward “Cadillac” hearing systems, composed of central panels with corps of highly trained and handsomely paid administrative law judges, is slowing. Even states with central panels<sup>15</sup> opt out of the central panel for at least some agency adjudications, often keeping executive agency adjudications for high volume or less politically sensitive proceedings.<sup>16</sup>

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independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by ensuring impartial decision making.”); *but see* Ass’n of Admin. Law Judges v. Heckler, 594 F. Supp 1132, 1141 (D.D.C. 1984) (holding that “on matters of law and policy, however, ALJs are entirely subject to the agency.”).

14. Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN L. REV. 475, 480 (2001) (“With delegation from the agency to the central hearing office, the cost is the ability to retain control over the process by which adjudications are carried out.”).

15. At last count, twenty-five states and three cities use the central panel system in some format. Their jurisdictions vary significantly by state. *See* Allen C. Hoberg, *Ten Years Later: The Progress of State Central Panels*, 21 J. NAT’L ASS’N ADMIN. L. JUDGES 235, 244 (2001).

16. For example, California does not use its central panel for human services and benefits cases, employment security or workers’ compensation. *See* Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067 (1992); *see also* CAL. GOV’T CODE § 11 (West 2003). Washington’s central panel does not have jurisdiction over workers’ compensation, motor vehicle licensing, revenue and health professional licensing. *See* State of Washington, Office of Administrative Hearings, at <http://www.oah.wa.gov/AboutOAH.htm> (last modified February 4, 2004). In

The argument for central panels maintains that there is significant risk of bias when the hearing officer is employed by the very agency to be judged.<sup>17</sup> However, tension between the agency and its in-house adjudicators is found to some degree in most agencies where that structure exists.<sup>18</sup> In a sense, this tension is positive, because it suggests hearing officials act impartially and do not merely rubber-stamp agency decisions. Although hearing officials act in the dual capacity of impartial decision maker and agency employee, the integrity of both positions can be maintained if appropriate standards are in place.<sup>19</sup> As stated in the Model Code of Ethics for the National Association of Hearing Officials:

Hearing officials should always withdraw from any proceeding in which their impartiality becomes compromised for any reason. However, the hearing official should not withdraw from a proceeding if the hearing officials' impartiality is challenged solely on the basis that the hearing officials are employed by an agency appearing in the proceeding. The parties may

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Texas, the Department of Human Services agency hearing officers hear thousands of public assistance and benefit matters each year. Texas Department of Human Services, at <http://www.dhs.state.tx.us/> (last modified February 13, 2002). The state of Maryland, touted as having the broadest jurisdiction of the "Cadillac" central panel states, still has agencies exempted from its jurisdiction. Hoberg, *supra*, note 15, at 236 n. 12. Alaska, South Dakota and Virginia experimented with central panels and returned to agency adjudication or greatly scaled-down central panels.

17. See *Washington v. Harper*, 494 U.S. 210, 253 (1990) (asserting "hybrid function disables the independent exercise of each decision-maker's *professional judgment*." (emphasis in original)).

18.

[I]t is speculative to state that such [central panel] ALJ's would be 'more impartial' than those employed directly by a particular agency. We will not presume that state-employed professional ALJ's cannot, will not, or do not bring a constitutional level of impartiality to the cases they hear, even if one side is the agency that directly employs them.

Dep't of Alcoholic Beverage Control, 99 Cal. App. 4th 880, 886 (2002).

19. See *Brown v. City of Los Angeles*, 125 Cal. Rptr. 2d 474 (Cal. Ct. App. 2002).

agree to allow the hearing official to preside after full disclosure has been made.<sup>20</sup>

Because adjudicators are generally paid in one way or another by the agency appearing before them, whether as employees, as a charge back for services, or through contract, the existence of financial ties with that agency cannot automatically disqualify an adjudicator from hearing an executive agency matter.<sup>21</sup>

## II. ORGANIZATIONAL STRUCTURES FOR AGENCY HEARING FUNCTIONS

The varying roles of hearing officials and other agency personnel involved in the adjudicatory process complicate the organizational structure of an agency. An agency must perform legislative, executive and adjudicative functions within one governmental unit. The agency legislates by adopting rules or policies to implement its functions. In its executive or administrative capacity, the agency takes an action affecting a party on the outside, whether to determine eligibility, continue a license, or assess payment of fines, fees or liabilities. Relief from that action can be sought by way of an administrative hearing. The organizational structure that houses the function where the administrative appeal is heard must ensure the integrity and independence of the hearing process.<sup>22</sup> Protections for the hearing function vary widely by state and by agencies within each state. The following examples describe several organizational patterns.

### A. Agency Control

This traditional model for a hearings program existed before *Goldberg v. Kelly*<sup>23</sup> and continues today in many forms. The hearing

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20. NAT'L ASS'N OF HEARING OFFICIALS CODE OF ETHICS § III(3) (1999), available at [http://www.naho.org/code\\_of\\_ethics.htm](http://www.naho.org/code_of_ethics.htm). NAHO is a national voluntary association of hearing officials that has adopted this code as a guideline for its members and other hearing officials. See NAT'L ASS'N OF HEARING OFFICIALS CODE OF ETHICS § I (1999), available at [http://www.naho.org/code\\_of\\_ethics.htm](http://www.naho.org/code_of_ethics.htm).

21. See 5 U.S.C. § 554(d) (West 2003).

22. See 5 U.S.C. § 554(d).

23. 397 U.S. 254 (1970).

officer is either housed within an executive agency or program or works directly for a governing board, carrying out a prescribed function. Employees within the same part of the agency investigate a matter, prosecute by appearing at the hearing, and determine whether their peers were correct. In this model, staff and hearing officials report to and are supervised by the same board or management team.<sup>24</sup>

Sometimes an employee fills multiple positions, or switches roles with others involved in the process. Because the overlap of functions results in conflicting duties, most agencies avoid the assignment of different functions to one individual in the same adjudicatory proceeding.<sup>25</sup> For instance, some states, such as Washington, provide for disqualification of a hearing official for conflicts under the same principles applicable to judges in court proceedings.<sup>26</sup>

The combination of functions and supervision of different aspects of the process may present a quagmire of conflicts of interest for both management and adjudicators. In short, adjudicators "should not be subject to the authority, direction or discretion of one who has served as investigator, prosecutor, or advocate in a proceeding before the appeals officer or in its pre-adjudicative stage."<sup>27</sup>

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24. See *Leitman v. McAusland*, 934 F.2d 46, 49 (4th Cir. 1991) (accepting the use of a staff member as presiding official).

25. See, e.g., *Stone & Edwards Ins. Agency, Inc. v. Commonwealth, Dept. of Ins.*, 648 A.2d 304, 307 (Pa. 1994) (quoting *Lyness v. Commonwealth, State Bd. of Med. Exam'rs*, 605 A.2d 1204, 1209 (Pa. 1992)) (requiring the construction of "walls of division" to reduce the "threat or appearance of bias").

26. *Jackstadt v. Washington State Patrol*, 976 P.2d 190, 194 (Wash. 1999).

[Washington statutes] provide "that a reviewing officer may disqualify for any reason "for which a judge is disqualified." . . . Canon 3(D) of the [Code of Judicial Conduct] provides that "judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge has a personal bias or prejudice concerning a party;" the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding;" or "the judge previously served as a lawyer or was a material witness in the matter in controversy."

*Id.* at 194-195 (citations omitted).

27. MODEL CODE OF JUDICIAL CONDUCT FOR STATE UNEMPLOYMENT INS. APPEALS OFFICERS Canon 1 (Nat'l Ass'n of Unemployment Ins. Appellate Bds. 2002) (on file with author).



The chief characteristic of the agency control organizational structure is that the administrative agency or board consistently maintains control and oversight over all these competing functions. A common epithet used to describe programs organized in this manner is that "the fox is guarding the henhouse."<sup>28</sup> However, it is difficult to avoid such criticism under any administrative adjudicatory system when the individuals performing these functions all work for the government. Citizens outside of the bureaucracy often perceive a maze of lawyers and suspect that all government employees are in cahoots with one another. This sentiment is particularly prevalent where the hearing official works directly within the agency. In these cases, the agency's control structure makes ethics walls particularly important, because no apparent organizational barrier exists.

### *B. Direct Report to Agency Head*

An adjudicator may report directly to the agency CEO in some agencies, particularly in those that are small and have limited jurisdictions. The hearing official is designated to "speak for" the agency through its director. These hearing officials may either issue decisions in their own name or write a proposed decision for adoption and entry by the agency head.

Because of the myriad of functions under the agency director, this situation works best when there are few hearings with a limited number of programs and issues involved. Due to the pressure of daily operations, an agency CEO may not be able to devote much attention or time to monitoring the hearing process. This lack of attention may actually preserve the independent functioning of the hearing official. However, selective attention poses various problems. Political, program, or fiscal interests of the agency may provoke the director to become involved in particular cases of

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28. *McIntyre v. Santa Barbara County Employees' Retirement Sys.*, 91 Cal. App. 4th 730, 735 (2001). "Appellant presents no evidence that any person involved with his application is actually biased against him. Instead, his argument assumes that all hearing officers and staff members are biased against all applicants because they are paid by the Board, which is itself biased against all applicants." *Id.* at 735.

perceived import to the agency or its stakeholders.<sup>29</sup> Given the director's interest in the matter, the hearing official may feel pressured to treat the case differently.

Other functions involved with hearings may be organized to fall within a different chain of command, but still report ultimately to the same CEO so that the agency head may feel competing demands in any particular case. Nonetheless, it is generally recognized that ultimately combining all functions related to administrative hearings – investigative, prosecutorial, and adjudicative – in the agency head is acceptable.<sup>30</sup>

### *C. Management Function*

Some agency administrators believe that hearing officials provide a form of management to the operations of the agency through quality and error control. These agencies, therefore, house the hearing officials with others performing agency-wide management functions, such as budget, audit, and human resources. The problem that may arise with this scenario is that, while management operations require and involve frequent decisions, decisions made through adjudication are not of the same nature. Managers and adjudicators have different perspectives and goals for their respective processes.

The location of hearing functions in the agency structure may cause strain between the conflicting values and interests of management and adjudication. While management strives for efficiency of operations, adjudicators are bound by rules of due process that are seldom the most predictable and expedient way to

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29. Separation of functions does not bar an agency head from participating in an adjudicatory decision. *See* *Greene v. Babbitt*, 943 F. Supp. 1278 (W.D. Wash. 1996).

30. 5 U.S.C. § 557(b).

Congress' decision to allow an agency head to control all the functions represents a tradeoff between the goal of minimizing the risk of potential conflicts of interest attributable to an agency head's multiple roles and the goal of creating an efficient decision-making structure. The Supreme Court has consistently acquiesced in the balance Congress struck in the APA [5 U.S.C. Section 557(b)].

RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 9.9 (4th ed. 2002).

reach a final decision.<sup>31</sup> Quality improvement principles, which guide managers to streamline business processes, do not apply to adjudicators where such principles conflict with the protections afforded the parties by procedural rules, case law and due process principles.<sup>32</sup> Management may be driven by a desire for predictability of outcome. However, adjudicators apply principles of fairness to the proceeding and at times are authorized to consider equitable standards. Their legal analysis and interpretation of a rule or policy may not achieve the result management expected or intended.

The fundamental management concepts of accountability and lines of supervision may not easily co-exist with the obligation of hearing officials to render an impartial decision. Managers are accustomed to setting policies that employees are expected to follow and to work to fulfill the overarching goals of the agency. The decision reached by a hearing official may conflict with the position advocated by agency personnel who are not supervised by the adjudicator, or the position of the manager who supervises the adjudicator. Adjudication appears to break the traditional chain of command and creates a conflict between the integrity of the process and management's belief of what is best for the agency. The existence of ethics walls within this system can minimize the conflict and promote both the competing interests of efficient administration and fair treatment of customers or stakeholders.

#### *D. Legal Division*

Another model for organizational structure involves gathering functions related to legal activities in one unit within the agency under a legal official or director, such as an inspector general. These functions may include rule-making, policy adoption, contracts, advocacy, compliance, and prosecutorial duties, as well as the agency adjudicatory functions. An unspoken reason for this structure may be

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31. *See, e.g.,* Broddie v. Connecticut, 401 U.S. 371, 378 (1971) ("The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.").

32. *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987).

to isolate those individuals who are likely to frustrate the agency's overall mission.

The ramifications of this model are similar to the above model involving co-location with management. All legal functions may not have the same goals or standards and may in fact be in direct conflict with each other. Staff within these organizational structures must be aware of potential conflicts of interest and institute safeguards. For instance, the intent behind the drafting and adoption of a rule does not always coincide with its interpretation by adjudicators. If hearing representatives are also placed in the legal unit, the conflicts and need for separation are even more apparent. Ethics walls need to be in place to protect adjudication from other legal functions that bleed into the same proceedings or areas of concern.

### *E. Central Panel or Separate Hearing Agency*

This organizational structure takes hearings out of the mainstream agency, either to a separate executive agency that conducts hearings for multiple agencies or to an entity set up only to conduct hearings for the particular agency or type of hearing matter. Ideally, these agencies should be independent of the agencies appearing before them. However, links may exist between the central panel and the enforcement or regulatory agencies that pose similar problems requiring the construction of ethics walls within or between the organizations.

Funding may and usually does link the agencies. The funding for the hearing agency may come through the source agency or be dependent on the number or level of dispute referrals. Additionally, the notion of customer satisfaction may influence a hearing panel. If a program agency becomes dissatisfied with the central panel, it may threaten to or actually withdraw its adjudications from the panel, thereby reducing the scope of that panel's jurisdiction and its level of funding. On an operational level, hearing representatives employed by the agency often appear frequently before the same adjudicators, so they are more familiar with the hearing official than the citizen or attorney who appears only once. As a result, the administrative judge may appear to have an established bias favoring agency personnel.<sup>33</sup>

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33. "But given the frequent contact between Halford and members of the Board, it is only natural for them to have developed a relationship. That is precisely

In most states utilizing central panels, administrative agencies maintain a procedure for internal review after the initial or proposed decision by an administrative law judge.<sup>34</sup> The administrative agency retains this right to the final word in order to retain control over its programs and protect the consistency of decisions. The agency then provides the final interpretation of its rules to guide the courts. Such interests should not be motivating factors for independent ALJs, but the ALJs are normally bound to apply those rules as written and not create new law or standards. If internal agency review officers perform the review function, there is an equal need to construct and maintain a barrier around these additional decision makers similar to that surrounding the hearing officials who conduct the initial hearings for the agency.

### III. COMMUNICATION ISSUES

In all the organizational structures discussed, dealings between administrative adjudicators and agencies appearing before them raise concerns with respect to communications among the various actors in the process. These communications can cause actual, potential, or apparent conflicts of interest and pose issues that must be handled carefully to preserve the integrity of the process.

The primary concern is to determine when communications with or by a hearing official become *ex parte* and thus pose risks affecting fairness and due process to the other party or parties.<sup>35</sup> It is usually easier to be sensitive to limits on communications with outside parties, but similar restrictions must also apply within the agency. These agency communications can be as blatantly improper as an attempt to convince the adjudicator of the agency's position in a pending proceeding by means of providing supporting information not submitted during the hearing.<sup>36</sup> Impropriety is less clear when

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the reason defendants must exercise vigilance and caution, to ensure not only fairness, but the appearance of fairness." *Quintero v. City of Santa Ana*, 114 Cal. App. 4th 810, 817 (2003).

34. See, e.g., Washington State Administrative Procedures Act, WASH. REV. CODE § 34.05.464 (West, WESTLAW, through Chapter 1 of 2004 Regular Session).

35. See 5 U.S.C. § 554(d)(1) (prohibiting *ex parte* communication in formal adjudication).

36. *Greene v. Babbitt*, 943 F. Supp. 1278, 1286 (W.D. Wash. 1996).

the adjudicator seeks expertise from agency staff not involved in the specific case, soliciting background expertise in an arcane or specialized area or requesting information about customary interpretation of a rule or policy.<sup>37</sup> Adjudicators are often empowered to take "official notice" of "technical or scientific facts within the agency's specialized knowledge,"<sup>38</sup> which could be considered an indirect form of *ex parte* communication with an agency's adjudicator but is allowable so long as the experts consulted are not directly involved in the proceeding and the facts of the individual case are not addressed.

Communications from the agency to the hearing official that are permissible and do not raise the specter of *ex parte* issues are those that are made publicly or to the public at large, such as by adoption of a rule or policy or other interpretation of law. Even if a rule amendment is designed to overturn an interpretation in a hearing decision, these communications express the agency's policy in a formal, established, and public manner. Similarly, if agency adjudicators are allowed to select decisions to be granted precedential value by other adjudicators or the agency, it would not violate *ex parte* restrictions if the agency recommends selection of a particular case, provided other parties have the same opportunity to nominate decisions.

If not directly related to a particular matter, communications may still have undertones affecting an adjudicator's decision-making if they attempt to directly or indirectly control behavior through budget, salary, facility, and staffing decisions. Threats of elimination, substantial budget cuts, or workload increases may serve as retaliation against adjudicators.<sup>39</sup> Such threats are particularly insidious because, although the motivation behind these plans may be suspect, in most cases it is difficult to establish that they are

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37. See, e.g., WASH. REV. CODE § 34.05.455(1)(c) (West, WESTLAW, through Chapter 1 of 2004 Regular Session): "Presiding officers may communicate with other employees or consultants of the agency who have not participated in the proceeding in any manner, and who are not engaged in any investigative or prosecutorial functions in the same or factually related case."

38. WASH. REV. CODE § 34.05.452(5) (West, WESTLAW, through Chapter 1 of 2004 Regular Session).

39. On the other hand, an agency must also ensure that its actions do not "create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county." *Haas v. County of San Bernadino*, 27 Cal. 4th 1017, 1037 (2002).

impermissible. These efforts will usually be presented as part of normal agency operations, which otherwise would be appropriate under prevailing economic conditions.

Notwithstanding the potential threat of inappropriate conduct directed at hearing officials, an agency is still entitled to supervise the manner and quality of the adjudicator's work. Of course, this supervision does not extend to demanding a different legal opinion or decision from what the adjudicator reached through competent review of the facts and law under the principles of due process in a particular case.<sup>40</sup> A supervisor cannot evaluate the adjudicator's work on the basis of the result reached in a decision unless that decision is unfounded in the law or not reasonably supported by the facts. While review of decisions may be permitted by the jurisdiction, the communication is improper if the hearing officer is pressured to change a reasoned and well-founded decision. Supervision and control may be exercised over the content and text of a poorly written, unsupported or unclear decision to ensure that the adjudicator submits a quality product that affects the rights of the parties and can be understood and applied by them.

The final decision must be that of the official rendering it, whether that official is the individual conducting the hearing or the director or board member reviewing a proposed decision. If the hearing official has authority to issue the final decision, that decision must coincide with what the adjudicator believes to be the correct result, and he or she must not accept a substitution of judgment by someone who has not heard the case. If the hearing official's decision is recommended or proposed to an ultimate decision-maker authorized to enter the final decision, that authority may substitute judgment and analysis for that of the presiding officer as authorized by law or procedure, provided that the authority has reviewed the matter and has valid reason for not deferring to the judgment of the adjudicator hearing the case.

Hearing officials also need to be able to consult and collaborate on interpretations of law in order to develop correct and consistent results without violating *ex parte* standards. They may consult with attorneys general, provided that their office has screening and separation of functions within its staff to ensure that persons providing legal counsel to the hearing official may not also advise the

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40. 5 U.S.C. § 557(b).

agency during the hearing.<sup>41</sup> Conversely, a hearing official may give constructive input into policies or rules that cause problems of interpretation or comment on the adequacy of staff work in preparation for hearings, but must be careful to separate such communications from any pending proceeding.

With regard to other agency staff, a hearing official need not be completely isolated. The official may socialize and join in agency activities so long as the prohibition of *ex parte* communication is understood and followed. However, the agency employees must avoid the appearance of impropriety. Awards, recognition, or the assignment of cases based on the outcome of decisions would be clearly improper, because they signal to adjudicators the "correct" way to decide a case. To protect the in-house agency adjudicator from improper communications, both direct and indirect, the agency needs to build and fortify ethics walls around the adjudicator and within the agency itself.

#### IV. HOW TO BUILD AND STRENGTHEN THE WALL

The administrative hearing process requires re-examination and appraisal of determinations made by an administrative agency. Regardless of the hearing official's employment or fiscal relationship with a party agency, the hearing official should exercise independence of action, decision, and judgment to protect the due process rights of parties and achieve a legally correct result in a case. The hearing official's maintenance of decisional independence from agency management and programs is crucial.<sup>42</sup>

The ethics wall, which protects the adjudicatory process from agency trespass, needs to be built of several components. First, the physical location of the adjudicators should be separate from the program or representational parts of the agency. Different locations should be used if possible; alternatively, structural separations can be used.<sup>43</sup> Surrounding staff should implement physical separation of

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41. *Sherman v. State*, 905 P.2d 355, 369 (Wash. 1995); *Greene v. Babbitt*, 943 F. Supp. at 1286.

42. NAT'L ASS'N OF HEARING OFFICIALS CODE OF ETHICS § IV (1999), available at [http://www.naho.org/code\\_of\\_ethics.htm](http://www.naho.org/code_of_ethics.htm).

43. As stated in *Quintero v. City of Santa Ana*, 114 Cal. App. 4th 810, 813 (2003):



potentially conflicting functions of the agency. Second, equipment, including fax machines, printers, copiers, file cabinets, and recycle bins, must be secured and maintained as independently as possible. If the agency cannot provide separate printers, copiers, and fax machines, other measures must be implemented to promote separation. These measures would include use of security codes that limit access to printed documents and frequent pickup of documents from the machine, to ensure that co-located program staff cannot view the hearing officials' work product. Protected computer directories and files are also essential to prevent the ability of advocates and others from premature access to the product of the decision-maker. Distribution lists of agency e-mail messages should not include adjudicators if pending cases or other impermissible communications may be included.

Organizational efforts must protect the process from intrusion by interested parties. As addressed above, any internal organizational structure presents challenges in building and maintaining a wall within the agency. However, processes and safeguards must be developed and implemented to prevent control of the hearing official's operational matters by personnel who act as adversaries in adjudications. Hearing officials must exercise complete control over their deliberations and decision-making process, including receipt of additional evidence, decision preparation and issuance, and any reconsideration. While involvement in ministerial aspects of the hearing process such as scheduling of hearings and selection of hearing rooms poses less risk of impermissible interference with the decision-making process, agencies must be careful not to exert indirect control over the hearing official through means such as making less favorable assignments to less favored adjudicators. Hearing office support staff should be dedicated to the adjudicatory functions whenever possible and not work for parts of the agency that

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Preliminarily, we agree that in the context of administrative law, there is no absolute prohibition against the city attorney's office representing both the Board and other city agencies such as the police department. Provided certain guidelines are met, the city attorney's office may "act[] as an advocate for one party in a contested hearing while at the same time serving as the legal adviser for the decision maker." (*Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1579 [5 Cal. Rptr. 2d 196].) But, "[p]erformance of both roles ... is appropriate only if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate." (*Id.* at p. 1586.)

may appear at hearings. When seeking the advice of counsel, the agency should ensure an ethics wall is present within the Attorney General's office, including separate offices or sections for attorneys advising the different functions and programs.<sup>44</sup>

The chain of command should be designed to best protect the fairness and integrity of the hearing process within the agency, with the role of the supervisor limited to review of competency and productivity.<sup>45</sup> The supervisor must refrain from interfering with independent judgment and may review only the quality of the process, without influencing reasoned results.<sup>46</sup> Conduct and communication protocols for interacting with hearing officials needs

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44. The court in *Quintero* addressed the role of a city attorney who had served both as an advocate before the board and as an advisor to the board as follows:

As noted in *Howitt v. Superior Court*, *supra*, 3 Cal.App.4th 1575, dual representation is not barred so long as there is an adequate separation of the two roles and the attorneys performing them. (*Id.* at pp. 1586-87.) What is inappropriate is one person simultaneously performing both functions. That is not to say that once a city attorney has appeared in an advisory role, he or she cannot subsequently act as a prosecutor, or vice versa. But the attorney may occupy only one position at a time and must not switch roles from one meeting to the next.

114 Cal. App. 4th at 817.

45. For discussions on the permissible limitations of evaluations of the performance of administrative law judges and other hearing officials, *see, e.g.*, Edwin L. Felter, Jr., *Administrative Adjudication Total Quality Management*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 5 (1995); Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means and Ends*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (1997); Robert Robins Gales, *The Peer Review Process in Administrative Adjudication*, 21-1 J. NAT'L ASS'N ADMIN. L. JUDGES 56 (2001).

46. Influencing the results of decisions through these indirect means to achieve the result the agency desires may be tantamount to rule-making without meeting formal statutory requirements:

To the extent that administrative agencies jealously guard their ability to control the work of administrative law judges through supervision, discipline, and evaluation of their work product in order to reach unpublished agency goals or to enact unpublished agency policy, those agencies engage in rule-making in the shadows, hiding from other participants in the process in what manner they intend to interpret and enforce the published law.

R. Terrence Harders, *Striking a Balance: Administrative Law Judge Independence and Accountability*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 7-8 (1999).

to be established and enforced at all levels of the agency. The structure should grant the adjudicator functional decisional independence, insulated from both agency and political influence. Employment protections such as the civil service system that guard against arbitrary or retaliatory dismissals or require "good cause" for adverse personnel action promote the security of the position for a hearing official and guard against the threat of retaliation for unfavorable decisions.<sup>47</sup>

Comprehensive training is also essential to ensure the continued protection of the hearing process. Agency staff, boards, and directors must learn, according to their respective positions, what is permissible communication and interaction with the adjudicatory staff. New staff must be trained and current staff will need periodic refresher courses. The agency needs to instruct staff regarding the prohibition of *ex parte* communication and provide specific examples of situations to be avoided. Hearing officials must receive sufficient training in procedure, ethics, and substantive law to conduct fair proceedings, to resist *ex parte* communications, and to render sound, legally correct decisions.

## V. CONCLUSION

*"And, of course, an impartial decision maker is essential."*<sup>48</sup>

No matter how strong and thick the walls are, the crucial player in this process is the hearing official.

[O]ur real control over the process is what comes from within each of us: our integrity. Independence of the judge and hearing official must exist. It can exist as long as the mandates of the hearing authority affect form, not substance, and requirements are imposed for quality, not results. The hearing authority does have a role to provide a framework to ensure that the process

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47. *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 99 Cal. App. 4th 880, 886 (2002).

48. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

is, and appears to be, fair, impartial and independent.<sup>49</sup>

Hearing officials must be constantly aware of the tensions that result from their position in the agency structure. They must faithfully apply due process principles, avoiding even the appearance of impropriety. Regardless of where they are located within the government organizational structure, hearing officials must be impartial and conduct the proceedings with integrity. Ultimately, it is the responsibility of the adjudicators to ensure that the agency monitors and preserves the ethics walls it has built.

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49. Judge Laurence H. Geller, *Integrity – The Heart and Soul of Administrative Adjudication*, NAHO NEWS Vol. VIII, No. 1 (Nat'l Ass'n of Hearing Officials, Sacramento, Cal.) March 1999, at 1 (on file with author).

